SUPREME COURT, U. S.

FEB 2 1976

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-766

GARY OGDEN,

Petitioner,

vs.

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,

Respondent.

No. 75-767

DANNY ATKINSON,

Petitioner,

vs.

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

Pages

I. Opinions Delivered in the Courts Below 1

II. Jurisdictional Statement 2

III. Constitutional Provisions, Statutes and Rules Involved 2

IV. Questions Presented 2

V. Statement of the Case 3

Argument:

United States Court of Appeals for the Eighth Circuit correctly concluded that the petitioners herein were not deprived of their constitutional right to the due process of the law. 4

(a) While the United States Court of Appeals for the Eighth Circuit correctly concluded that the evidence allegedly suppressed was not sufficiently material to warrant the relief sought, that court incorrectly initially found that the prosecution had in fact suppressed evidence. 4

(b) Even if the actions or omissions of the prosecutor herein constituted suppression, the material contained in the written report of the polygraph examination given the prosecutrix was not of such inherent significance, had it been utilized by the defense, so as to have constituted a fundamental unfairness by its absence. 7

Conclusion 12

CASES CITED

Pages

Brady v. Maryland, 373 U. S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 ..... 4, 7

Evans v. Janing, 489 F. 2d 470 (8th Cir. 1973) 8

Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 5

Link v. United States, 352 F. 2d 209 (8th Cir. 1965) 8

Moore v. Illinois, 408 U. S. 786, 33 L. Ed. 2d 706, 92 S. Ct. 2562 ..... 4, 5, 6, 7

Ogden v. Wolff, 522 F. 2d 816 at 824 (8th Cir. 1975) 9, 10, 11

United States v. Keogh, 391 F. 2d 138 (2nd Cir. 1968) 8

CONSTITUTION CITED

Fifth and Fourteenth Amendments to the United States Constitution 2

BLEED THROUGH

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I.

OPINIONS DELIVERED IN THE COURTS BELOW

Respondent accepts petitioners' respective statements of the opinions delivered in the courts below with the exception of the addition of the citation to the decision of the United States Court of Appeals for the Eighth Circuit which can be found at 522 F. 2d 816 (8th Cir. 1975).

II.

JURISDICTIONAL STATEMENT

Respondent accepts petitioners' respective jurisdictional statements.

———o———

III.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Respondent accepts petitioners' respective statements of the constitutional provisions, statutes and rules involved.

———o———

IV.

QUESTIONS PRESENTED

Whether the nondisclosure to the petitioners' counsel of the written record of a polygraph examination and a pretest interview conducted upon the prosecutrix, in the absence of any defense production request, constituted suppression of evidence and, if so, whether the material suppressed was of such inherent significance as to represent fundamental unfairness in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

———o———

BLEED THROUGH

V.

STATEMENT OF THE CASE

Respondent generally accepts the petitioners' statements of the case with the exception of certain portions of petitioners' statements of "FACTS AT MOTION FOR A NEW TRIAL." Respondent rejects the phrase found in the third full paragraph on page nine of petitioner Atkinson's brief and found in the first paragraph of page ten of petitioner Ogden's brief which states:

> "The prosecutor received the written report from his predecessor in office, *a report which exonerated petitioner. . . .* " (Emphasis added.)

This conclusion is rejected as being clearly not supported by the contents of the record. The respondent also rejects the conclusion following the sentence in the first paragraph on page ten of petitioner Atkinson's brief and contained in the second paragraph on page ten of petitioner Ogden's brief which states:

> " ' . . . That the other boys had intercourse (and) that there was no question that she was telling the truth, . . . ' *This, of course, was not accurate,* . . . " (Emphasis added.)

This conclusion is also rejected as being not supported by the record. Respondent finally rejects as being argumentative and not a concise statement of fact the sentence beginning the second paragraph on page ten of petitioner Atkinson's brief and beginning the third paragraph on page ten of petitioner Ogden's brief which reads:

> "Until the day originally set for sentencing of Seger, the prosecutor led his lawyer and petition-

er's to believe that Omer's report on Kathy's polygraph examination was oral rather than written; and this affirmative misleading was not dispelled until as late as January 16, 1973, . . ."

ARGUMENT

United States Court of Appeals for the Eighth Circuit correctly concluded that the petitioners herein were not deprived of their constitutional right to the due process of the law.

(a)

While The United States Court of Appeals For The Eighth Circuit Correctly Concluded That The Evidence Allegedly Suppressed Was Not Sufficiently Material To Warrant The Relief Sought, That Court Incorrectly Initially Found That The Prosecution Had In Fact Suppressed Evidence.

The United States Court of Appeals for the Eighth Circuit in their holding below, based their decision, in large part, upon the standards set forth by this court in *Moore v. Illinois*, 408 U. S. 786, 33 L. Ed. 2d 706, 92 S. Ct. 2562. This court in *Moore, Id.*, clarified the position taken in *Brady v. Maryland*, 373 U. S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194, and established a three step process to be used in evaluating allegations of the denial of due process resulting from the suppression of evidence by the prosecution. This court in *Moore, supra*, specifically held:

"The heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a

BLEED THROUGH

> defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." *Moore v. Illinois, supra,* at 794-95.

It is contended that while the United States Court of Appeals for the Eighth Circuit correctly concluded that the material contained in the written report of the polygraph examination was not sufficiently material to justify the relief sought, it is the respondent's position that the court incorrectly initially concluded that the prosecution had suppressed evidence.

In *Moore v. Illinois, supra,* the defense moved for the disclosure of all of the written statements taken by the police from any witness. The prosecutor furnished what he thought to be all of the file pertinent to this defense request, but it was subsequently discovered that certain statements had inadvertently not been furnished. This court ultimately concluded that the substance of the items not disclosed was not "material" to the defense but reversed in part and remanded for the correction of the imposition of the death penalty in light of this court's holding in *Furman v. Georgia,* 408 U. S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726.

In the case at bar the undisputed facts indicate that the polygraph examination was given to the prosecutrix at the request of the counsel for the defense (Proceedings in the United States District Court for the District of Nebraska, 10:21-25) and that the prosecuting attorney informed the defense counsel of the fact that the prose-

cutrix had taken a polygraph examination (Proceedings in the United States District Court for the District of Nebraska, 11:12-13; 18:12-13). The record clearly shows that no formal or informal request of any kind was ever made by the defense counsel for the production of this written report (Proceedings in the United States District Court for the District of Nebraska, 12:18-20; 18:1-9). The prosecuting attorney testified had the defense counsel requested the report he would have furnished it and at no time did he deny the defense counsel access to the report (Proceedings in the State District Court, *State v. Atkinson,* Second Vol. I, Bill of Exceptions, 96:11-20).

This court, in *Moore v. Illinois, supra,* specifically held that:

> "The *heart* holding in Brady is the prosecution's suppression of evidence *in the face of a defense production request, . . .*" (Emphasis added.) *Moore, supra,* at 794-95.

It is, therefore, contended that suppression in a constitutional context has in fact not occurred where there has been no defense production request. It is argued that such a position is reinforced under factual circumstance wherein such a polygraph examination had been given at the request of the defense and where the fact that the test had been given and a report made, known by the defense.

It is further argued that where, as here, the prosecutor has not practiced deception, suborned perjury or in any other way violated his duty as an officer of the court, the constitutional effect of the failure of the defense to have made use, at trial, of material of possible

BLEED THROUGH

value, should be judged by a standard similar to the "due diligence" requirement utilized in reviewing the denial of motions for a new trial based on newly discovered evidence.

It is, therefore, concluded that the court below incorrectly applied this court's holdings in *Brady v. Maryland, supra,* and *Moore v. Illinois, supra,* in reaching their initial conclusion that the prosecutor herein had suppressed evidence.

(b)

Even If The Actions Or Omissions Of The Prosecutor Herein Constituted Suppression, The Material Contained In The Written Report Of The Polygraph Examination Given The Prosecutrix Was Not Of Such Inherent Significance, Had It Been Utilized By The Defense, So As To Have Constituted A Fundamental Unfairness By Its Absence.

The United States Court of Appeals for the Eighth Circuit after first concluding that the written report of the polygraph examination had in fact been suppressed and that the nature of the material contained within the report was of a favorable character to the defense, concluded that the written report was, however, not sufficiently material or of such an inherent significance so as to have represented a fundamental unfairness.

The Eighth Circuit has consistently held that the degree of materiality needed to vitiate a conviction, where evidence has been held to have been suppressed, is dependent upon two factors: (1) whether the evidence is substantive evidence or impeachment evidence, and (2)

whether there has been a request for the information. *Evans v. Janing,* 489 F. 2d 470 (8th Cir. 1973). The Eighth Circuit has also held that suppressed impeachment evidence requires a higher standard of materiality than would be imposed for evidence directly relevant to guilt. *Link v. United States,* 352 F. 2d 209 (8th Cir. 1965). And where there has been no request for production, the standard of materiality is higher than where there has been a request. *Evans v. Janing, supra; United States v. Keogh,* 391 F. 2d 138 (2nd Cir. 1968). Therefore, the Eighth Circuit has held, that where the evidence would be used for impeachment purposes only, and where there has been no request for the production of that evidence, there is an especially high standard of materiality imposed.

In the instant case the material allegedly suppressed was the written report of the polygraph examination given the prosecutrix. Petitioners contend that this report would have been of value to them as a means to impeach the testimony given at trial by the prosecutrix. However, the record of the state court proceedings, with respect to both petitioners, discloses that the prosecutrix was substantially and thoroughly impeached during cross-examination by the defense counsel in spite of the fact that he was not making use of the material contained within this report.

With respect to petitioner Atkinson, the United States Court of Appeals for the Eighth Circuit found:

> ". . . Our examination of the trial transcript convinces us that prosecutrix was vigorously cross-examined on the issue of penetration at Atkinson's second trial. She was impeached on two occasions

BLEED THROUGH

> as to the differences between her trial testimony and her testimony at the preliminary hearing. Furthermore, the version of the incident related by prosecutrix to the polygraph operator is so similar to the version on which she was impeached that its trial effect would only have been as cumulative evidence of impeachment." *Ogden v. Wolff,* 522 F. 2d 816 at 824 (8th Cir. 1975).

This cross-examination occurred during the second trial of petitioner Atkinson and can be found beginning on page 113, line 16 of the Bill of Exceptions from the state court proceedings and can also be found set forth within the body of the opinion of the United States Court of Appeals for the Eighth Circuit which is reproduced as appendices to the petitioners' briefs and can be found beginning on page 47.

The court below went on to find:

> "The polygraph pre-test in dispute here did not contradict her testimony regarding Atkinson's two attempts to rape her. At no time does prosecutrix contradict herself as to the fact that Atkinson twice removed his clothing and hers. Nor was she inconsistent on the issue of the sexual nature of his advances. The suppressed statement was merely at odds with her trial testimony on direct examination as to the extent to which those attempts at penetration were successful. Furthermore, her statements to the polygraph operator in which she doubted penetration by Atkinson were not at variance with her testimony at the preliminary hearing and on cross-examination at trial in which she stated that he didn't 'get in.' Viewed in this light, the impeachment evidence contained in the polygraph report had already been brought to bear on cross-examination." *Ogden, supra,* at 825.

Finally the court below concluded:

> ". . . Thus it seems quite apparent that the evidence in the suppressed polygraph report concerning Atkinson's unsuccessful 'attempts' to have sexual relations with prosecutrix were sufficient under the law to constitute the crime with which he was charged. It appears that the report could have done him as much harm as good.
>
> "Based on our examination of the record in this case we are satisfied that Atkinson has not demonstrated that he was afforded a fundamentally unfair trial . . ." *Ogden, supra*, at 825.

It is therefore contended with respect to the claims of petitioner Atkinson that he has failed to establish that he is entitled to the relief sought or that the court below incorrectly applied the law to the facts of his case.

It is likewise contended with respect to petitioner Ogden that the use of the information contained in this report by the defense counsel would have been cumulative only to the actual thorough impeachment of the prosecutrix which similarly occurred at petitioner Ogden's state court trial. The actual record in this instance can be found beginning at page 112, line 13 of the Bill of Exceptions of Ogden's state court trial proceedings and continues through page 118, line 25. The impeachment resumes again at page 119, line 1 and concludes on page 124, line 3.

Petitioner Ogden contends that the prosecutrix's negative answer to question No. 29 in the polygraph examination regarding whether she "let him have sex with her", exonerates him and is therefore relevant to his guilt or innocence. The court below found that this evi-

BLEED THROUGH

dence would have been of little or no value. As the court below found, Ogden assumes in his argument that the word "let" refers to the fact of intercourse. It is argued that an equally plausible interpretation would substitute the word "permit" for the word "let". As the court below found, any value to petitioner Ogden arising out of this question and answer under this interpretation is therefore lost.

The court below found:

> ". . . that the report as a whole could have been useful to Ogden only as a tool for impeaching the general credibility of the prosecutrix. As such it would have been primarily cumulative. She was extensively cross-examined at each trial with reference to inconsistencies between her testimony at trial regarding penetration and a myriad of other factual details compared with earlier statements made by her under oath at a preliminary hearing and at Atkinson's trials. Further impeachment on these collateral matters would not have served any appreciable credibility-impugning purpose." *Ogden, supra,* at 823.

The court below went on to conclude that by:

> "Applying the elevated materiality standard [citation omitted] to this impeachment evidence, we have concluded that Ogden has not shown that the suppression of the polygraph report as to him constituted fundamental unfairness. . . ." *Ogden, supra,* at 823.

Therefore with respect to the claims of petitioner Ogden it is the respondent's contention that he has failed to establish that he is entitled to the relief sought or that the court below erred in applying the applicable law to the facts of his case. Therefore, it is concluded with re-

spect to both petitioners that their respective petitions for writs of certiorari should be therefore denied.

CONCLUSION

For he reasons set out above, it is respectfully concluded that the petitions for writs of certiorari to the United States Court of Appeals for the Eighth Circuit, filed herein, should be denied.

Respectfully submitted,

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